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Friday, September 22, 2000

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#### UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF CALIFORNIA

This above-entitled action came to trial on August 15, 2000. Benjamin Elliot Kaplan and Douglas Cameron MacLellan appeared for Plaintiff. James D. Wood appeared for Defendant. Upon due consideration, the court hereby makes the following findings of fact and conclusions of law.

#### **FINDINGS OF FACT**

(1) Defendant Joseph Nathan Garcia lived in a close personal relationship with Bert Walden from 1984 until Walden's death in 1998.

(2) Walden suffered from alcoholism and depression. Prior to September 1997, he had not worked for more than two years. Starting in 1996, Walden collected Social Security disability benefits of approximately \$650 per month.

(3) Garcia maintained two credit cards for his personal use: Mastercard account number 5458-0001-9214-2145 and American Express account number 3722-813610-31004. Walden was an additional cardholder on the Mastercard account, but not on the American Express account.

(4) Prior to Summer 1997, Garcia learned that Walden had obtained credit cards in Garcia's name without Garcia's permission.

- (5) In mid-Summer 1997, Garcia discovered that Walden had obtained approximately \$10,000 cash through Garcia's American Express account by forging Garcia's signature on convenience checks.
- (6) Plaintiff Stephen Suzman operates an interior design studio.
- (7) In September 1977, Walden applied for a job as Suzman's bookkeeper. On his employment application, he listed Garcia as a reference.
- (8) In September 1997, Suzman called Garcia to obtain an employment reference regarding Walden. Garcia gave a favorable reference. He stated that Walden was honest. He did not reveal that Walden had recently forged checks on his American Express account or that he lived with Walden in a close personal relationship.
- (9) Suzman hired Walden as a bookkeeper in September 1997 at a salary of approximately \$3,000 per month.
- (10) Beginning in early October 1997, Walden embezzled funds from Suzman. He did so by preparing checks on Suzman's account payable to Mastercard and American Express (Suzman had accounts with both) and then obtaining or forging Suzman's signature on each check. Walden later wrote on each check the number of Garcia's Mastercard or American Express account. In this way, Walden used Suzman's bank account to make payments on Garcia's credit cards.
- (11) Between October 6, 1997 and July 29, 1998, Walden misdirected 51 checks on Suzman's account in the total amount of \$28,614. Of these, 38 checks totalling \$16,986 were misdirected to Garcia's Mastercard account and 13 checks totalling \$11,628 were misdirected to Garcia's American Express account.
- (12) In 1998, Suzman became dissatisfied with Walden absenteeism and slowness in processing accounts and asked his Controller, Donna Downer, to examine Walden's work papers.
- (13) When Downer's investigation uncovered Walden's embezzlement, Walden committed suicide.
- (14) Suzman demanded that Garcia repay the embezzled funds that had been used to pay Garcia's credit cards. When Garcia refused, Suzman filed suit against Garcia in San Francisco County Superior Court.
- (15) Garcia filed a petition under chapter 7 of the Bankruptcy Code on September 16, 1999.
- (16) Suzman timely filed the present nondischargeability action on December 30, 1999.
- (17) Garcia received monthly credit card statements that showed what payments had been made within the prior month on his Mastercard and American Express cards.

(18) Garcia carefully monitored the statements for the American Express account because Walden had recently forged checks on that account. He carefully monitored the statements for the Mastercard account because that was his primary personal credit card. Garcia received and reviewed each statement within 10 days of the closing date shown on the statement.

(19) An examination of the misdirected Suzman checks and Garcia's credit card statements show that the following payments were made with Suzman's funds.

Statement date	Credit card account	Payments shown	Payments from Suzman funds
May 3, 1997	American Express	\$ 325	\$ 0
May 14, 1997	Mastercard	100	0
June 3, 1997	American Express	325	0
June 13, 1997	Mastercard	1,000	0
July 3, 1997	American Express	500	0
July 15, 1997	Mastercard	750	0
August 8, 1997	American Express	700	0
August 14, 1997	Mastercard	100	0
September 9, 1997	American Express	600	0
September 15, 1997	Mastercard	1,000	0
October 3, 1997	American Express	620	0
<b>[Embezzlement begins October 6, 1997]</b>			
October 14, 1997	Mastercard	1,066	1,000
November 2, 1997	American Express	900	900
November 14, 1997	Mastercard	1,000	1,000
December 3, 1997	American Express	900	0
December 15, 1997	Mastercard	2,000	2,000
January 3, 1998	American Express	900	900
January 15, 1998	Mastercard	2,640	2,640
<b>Summary:</b>			
October 14, 1997 to	American Express	2,700	1,800
January 15, 1998	Mastercard	6,706	6,640
	<b>Total</b>	<b>\$ 9,406</b>	<b>\$ 8,440</b>

(20) Garcia knew that between September 15, 1997 and January 15, 1998, Walden had made payments on the Mastercard and American Express accounts totalling \$8,440. In so finding, I make and rely upon the following subsidiary findings of fact.

(a) The checks and statements show that Walden used embezzled funds to make payments totalling \$8,440 during that period.

(b) Garcia knew Walden had made payments in that amount, even if Garcia did not have knowledge of the embezzlement, because Garcia knew the total payments made from the account statements, Garcia knew the amounts he had paid personally, and Garcia would assume that all payments he did not make were made by Walden.

(21) By January 22, 1998, Garcia knew that Walden was using stolen funds to make payments on Garcia's Mastercard and American Express accounts. In so finding, I make and rely upon the following subsidiary findings of fact.

(a) Garcia knew that Walden's income from all sources from September 15, 1997 to January 15, 1998 did not provide Walden sufficient funds to make credit card payments in any amount near \$8,440.

(b) Garcia knew that Walden was dishonest, because Walden had recently diverted money from Garcia by forging checks on Garcia's American Express account.

(c) Garcia knew that as Suzman's bookkeeper Walden had an opportunity to embezzle funds from Suzman.

(d) The long-term personal relationship between Garcia and Walden enabled Walden to keep few secrets from Garcia.

I use the language "Garcia knew Walden was using stolen funds" to describe the following state of mind: (i) Garcia had consciously thought about whether Walden was using stolen funds; and (ii) Garcia subjectively believed it was more likely than not that Walden was using stolen funds. Thus, Garcia "knew" Walden was using stolen funds even if he was not certain that was the case, but Garcia did have a conscious belief that Walden was using stolen funds and not merely reason to know.

(22) Walden misdirected a total of \$17,046 of Suzman's funds into the Mastercard and American Express accounts after January 22, 1998.

(23) Any finding of fact that is properly a conclusion of law shall be construed as a conclusion of law.

## **CONCLUSIONS OF LAW**

(1) This court has subject-matter jurisdiction over this action under 28 U.S.C. § 1334(b).

(2) Venue is proper in this district under 28 U.S.C. § 1409(a).

(3) This action is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

(4) Under California law, Garcia is liable to Suzman under the theory of unjust enrichment for

the entire amount of Suzman funds that Walden diverted to pay Garcia's Mastercard and American Express accounts. See 1 B.E. Witkin, Summary of California Law, § 91 (9th ed. 1987).

(5) Garcia's liability to Suzman under California law is nondischargeable in Garcia's chapter 7 bankruptcy to the extent that liability results from Garcia's willful and malicious injury to Suzman. 11 U.S.C. § 523(a)(6).

(6) To constitute willful and malicious injury, Garcia's actions must have been both intentional and malicious (i.e., with the intent to harm Suzman). See Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998).

(7) Malice (intent to harm) need not be proven directly, but may be inferred from the nature of Garcia's actions. If Garcia intentionally performed an act that was plainly and inherently harmful to Suzman, it is reasonable to infer that Garcia intended the harmful natural consequences of his act. See Miller v. J.D. Abrams, Inc., 156 F.3d 598, 603 (5th Cir. 1998).

(8) In personally using the Mastercard and American Express cards, and in continuing to maintain the Mastercard that he knew Walden was using, after he acquired knowledge that Walden was using funds stolen from Suzman to pay both accounts, Garcia caused willful and malicious injury to Suzman. Garcia's maintenance and use of the cards was an intentional act. When done after January 22, 1998 with knowledge that he and Walden were using funds stolen from Suzman to pay those accounts, this intentional act was so inherently wrongful that Garcia's malice toward Suzman should be inferred from the nature of the act.

(9) Garcia's liability to Suzman is nondischargeable pursuant to 11 U.S.C. § 523(a)(6) with respect to all funds Walden diverted from Suzman that were credited to the Mastercard and American Express accounts after January 22, 1998.

(10) Plaintiff is entitled to recover prejudgment interest on each diverted check at the federal judgment rate of 6.241 percent per annum. Cal. Civil Code § 3287(a); 28 U.S.C. § 1961. Pre-judgment interest is calculated from the date that each transfer of funds diverted from Suzman was credited to the Mastercard or American Express account.

(11) Any conclusion of law that is properly a finding of fact shall be construed as a finding of fact.

Dated: September 15, 2000

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Thomas E. Carlson United States Bankruptcy Judge

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